STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

LA DONYA MILNER, Charging Party, v. CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION, Respondent.	Case No. LA-CO-1469-E PERB Decision No. 2224 November 30, 2011

Appearance: La Donya Milner, on her own behalf.

Before Martinez, Chair; McKeag and Dowdin Calvillo, Members.

DECISION

DOWDIN CALVILLO, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by La Donya Milner (Milner) of a Board agent's dismissal (attached) of her unfair practice charge. The charge, as amended, alleged that the California School Employees Association (CSEA) breached its duty of fair representation under the Educational Employment Relations Act (EERA)[1] by failing to adequately assist Milner with her concerns over changes in her lunch schedule, an "unjustified write up," and her complaints over alleged racial discrimination and harassment by her employer, the Lynwood Unified School District (District). The Board agent found that the charge failed to state a prima facie violation of the duty of fair representation. In addition, the Board agent found that CSEA had

[1] EERA is codified at Government Code section 3540 et seq.

no duty to assist Milner with her racial discrimination claims against the District, absent evidence demonstrating that a collective bargaining agreement imposed such a duty.[2]

The Board has reviewed the dismissal and the record in light of Milner's appeal and the relevant law. Based on this review, we find the dismissal and warning letters to be well-reasoned, adequately supported by the record, and in accordance with applicable law. Accordingly, the Board adopts the dismissal and warning letters as the decision of the Board itself, supplemented by the discussion below.

DISCUSSION

Compliance with Requirements for Filing Appeal

Pursuant to PERB Regulation 32635(a),[3] an appeal from dismissal must:

> (1) State the specific issues of procedure, fact, law or rationale to which the appeal is taken;
>
> (2) Identify the page or part of the dismissal to which each appeal is taken;
>
> (3) State the grounds for each issue stated.

To satisfy the requirements of PERB Regulation 32635(a), the appeal must sufficiently place the Board and the respondent "on notice of the issues raised on appeal." (*State Employees Trades Council United (Ventura, et al.)* (2009) PERB Decision No. 2069-H (*State Employees Trades Council*); *City & County of San Francisco* (2009) PERB Decision No. 2075-M.) An appeal that does not reference the substance of the Board agent's dismissal fails to comply with PERB Regulation 32635(a). (*United Teachers of Los Angeles (Pratt)*

[2] As noted in the Board agent's warning and dismissal letters, Milner may have administrative and judicial remedies available to her in other forums with respect to her discrimination claims.

[3] PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

(2009) PERB Order No. Ad-381 (*Pratt*); *Lodi Education Association (Hudock)* (1995) PERB Decision No. 1124; *United Teachers - Los Angeles (Glickberg)* (1990) PERB Decision No. 846.) Likewise, an appeal that merely reiterates facts alleged in the unfair practice charge does not comply with PERB Regulation 32635(a). (*Pratt*; *State Employees Trades Council*; *Contra Costa County Health Services Department* (2005) PERB Decision No. 1752-M; *County of Solano (Human Resources Department)* (2004) PERB Decision No. 1598-M.)

The appeal in this case merely restates facts alleged in the original charge that CSEA failed to assist Milner in resolving her workplace issues. It fails, however, to reference any portion of the Board agent's determination or otherwise identify the specific issues of procedure, fact, law or rationale to which the appeal is taken, the page or part of the dismissal to which appeal is taken, or the grounds for each issue. Thus, it is subject to dismissal on that basis. (*City of Brea* (2009) PERB Decision No. 2083-M.)

New Evidence and Allegations on Appeal

In her appeal, Milner presents new factual allegations that were not presented in the original charge or the amended charge. "Unless good cause is shown, a charging party may not present on appeal new charge allegations or new supporting evidence." (PERB Reg. 32635(b); see also *CSU Employees Union, SEIU Local 2579 (Kyrias)* (2011) PERB Decision No. 2175-H.) The Board has found good cause when "the information provided could not have been obtained through reasonable diligence prior to the Board agent's dismissal of the charge." (*Sacramento City Teachers Association (Ferreira)* (2002) PERB Decision No. 1503.)

On July 19, 2011, the Board agent issued a letter advising Milner that the charge failed to state a prima facie case and warning her that the charge would be dismissed unless she amended the charge to state a prima facie case. Milner filed an amended charge on August 11, 2011. Thereafter, the Board agent dismissed Milner's amended charge on September 8, 2011. Milner

filed an appeal from the dismissal on October 5, 2011. The appeal includes new factual allegations provided for the first time on appeal that all predate the dismissal letter. The appeal provides no reason why they could not have been alleged in the original charge or in the amended charge. Thus, we do not find good cause to consider these new allegations.

ORDER

The unfair practice charge in Case No. LA-CO-1469-E is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chair Martinez and Member McKeag joined in this Decision.

STATE OF CALIFORNIA EDMUND G. BROWN JR., Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

Los Angeles Regional Office
700 N. Central Ave., Suite 200
Glendale, CA 91203-3219
Telephone: (818) 551-2808
Fax: (818) 551-2820

September 8, 2011

LaDonya Milner

Re: *Ladonya Milner v. California School Employees Association*
Unfair Practice Charge No. LA-CO-1469-E
DISMISSAL LETTER

Dear Ms. Milner:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on March 25, 2011. Ladonya Milner (Milner or Charging Party) alleges that the California School Employees Association (CSEA or Respondent) violated section 3540 et seq. of the Educational Employment Relations Act (EERA or Act)[1] by failing to assist her with her lunch schedule changes and her discrimination complaints against her employer.

Charging Party was informed in the attached Warning Letter dated July 19, 2011, that the above-referenced charge did not state a prima facie case. You were advised that, if there were any factual inaccuracies or additional facts that would correct the deficiencies explained in that letter, you should amend the charge. You were further advised that, unless you amended the charge to state a prima facie case or withdrew it prior to July 26, 2011, the charge would be dismissed. Your subsequent requests for additional time in which to amend the charge were granted, and a First Amended Charge was filed with PERB on August 11, 2011.

The First Amended Charge provides that the Lynwood Unified School District's (District) administrators would constantly interrupt Milner's lunch breaks. The First Amended Charge also provides that Milner met with her CSEA Labor Representative Donald Lockwood from November 2010 through February 4, 2011. The First Amended Charge further states that no grievance was filed regarding the District's change to Milner's lunch schedule; however, it also states that the District returned Milner to her regular lunch schedule three months later. CSEA provides that Lockwood did in fact grieve on Milner's behalf the interruption to her lunch schedule, and the matter was discussed and resolved informally at the first step of the grievance procedure.

In the Warning Letter, you were advised that in order to state a prima facie duty of fair representation violation, Charging Party must show that the Respondent's conduct was

[1] EERA is codified at Government Code section 3540 et seq. The text of the EERA and PERB Regulations may be found at www.perb.ca.gov.

arbitrary, discriminatory or in bad faith. (*United Teachers of Los Angeles (Collins)* (1982) PERB Decision No. 258.) You were further advised that PERB has stated the following with respect to grievance handling:

> Absent bad faith, discrimination, or arbitrary conduct, mere negligence or poor judgment in handling a grievance does not constitute a breach of the union's duty. [Citations omitted.] A union may exercise its discretion to determine how far to pursue a grievance in the employee's behalf as long as it does not arbitrarily ignore a meritorious grievance or process a grievance in a perfunctory fashion. A union is also not required to process an employee's grievance if the chances for success are minimal.

(*Ibid.*) The First Amended Charge fails to provide sufficient facts regarding how CSEA's handling of Milner's grievance regarding the change to her lunch schedule was arbitrary, discriminatory, or in bad faith. (*United Teachers of Los Angeles (Collins)*, *supra*, PERB Decision No. 258.) As provided above, CSEA was able to successfully resolve the District's interruption of Milner's lunch schedule, i.e., her lunch schedule returned to its regular schedule. Accordingly, this allegation is dismissed for failure to state a prima facie case.

You were also advised in the Warning Letter that your allegations that CSEA failed to assist you with your harassment and discrimination claims against the District did not state a prima facie case. You were further advised that a union generally does not have a duty to pursue a union member's race-based civil rights claims *unless* the collective bargaining agreement contains a non-discrimination clause or if the agreement itself is discriminatory. (*Greene v. Pomona Unified School District* (1995) 32 Cal.App.4th 1216, 1223-1224.) The First Amended Charge continues to allege facts regarding the District subjecting Milner to a hostile work environment, and CSEA's alleged failure to assist in resolving same. The First Amended Charge, however, does not allege any facts regarding whether CSEA had a duty to assist Milner with her discrimination complaints, i.e., whether the parties' collective bargaining agreement provided such a duty. (*Greene v. Pomona Unified School District*, *supra*, 32 Cal.App.4th 1216, 1223-1224.) Accordingly, this allegation is dismissed for failure to state a prima facie violation of the duty of fair representation.

The First Amended Charge also alleges that the District gave Milner an "unjustified write up" on February 4, 2011, which was placed in her personnel file. Other than asserting that the discipline was "unjustified," Milner fails to provide any facts regarding whether she requested assistance from CSEA to grieve the February 4, 2011 discipline. In fact, CSEA provides that Milner is responsible for both filing a step one grievance and for appealing any discipline to the District's Personnel Commission. Accordingly, this allegation also fails to state a prima facie violation of the duty of fair representation and is dismissed.

Based on the facts and reasons set forth above and in the attached July 19, 2011 Warning Letter, this charge is dismissed for failure to state a prima facie case.

Right to Appeal

Pursuant to PERB Regulations,[2] Charging Party may obtain a review of this dismissal of the charge by filing an appeal to the Board itself within twenty (20) calendar days after service of this dismissal. (Cal. Code Regs, tit. 8, § 32635, subd. (a).) Any document filed with the Board must contain the case name and number, and the original and five (5) copies of all documents must be provided to the Board.

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs, tit. 8, §§ 32135, subd. (a) and 32130; see also Gov. Code, § 11020, subd. (a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet which meets the requirements of PERB Regulation 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs, tit. 8, § 32135, subds. (b), (c) and (d); see also Cal. Code Regs., tit. 8, §§ 32090 and 32130.)

The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95811-4124
(916) 322-8231
FAX: (916) 327-7960

If you file a timely appeal of the refusal to issue a complaint, any other party may file with the Board an original and five copies of a statement in opposition within twenty (20) calendar days following the date of service of the appeal. (Cal. Code Regs, tit. 8, § 32635, subd. (b).)

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, § 32140 for the required contents.) The document will be considered properly "served" when personally delivered or deposited in the mail or deposited with a delivery service and properly addressed. A document may also be concurrently served via facsimile transmission on all parties to the proceeding. (Cal. Code Regs, tit. 8, § 32135, subd. (c).)

[2] PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

Extension of Time

A request for an extension of time, in which to file a document with the Board itself, must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three (3) calendar days before the expiration of the time required for filing the document. The request must indicate good cause for and, if known, the position of each other party regarding the extension, and shall be accompanied by proof of service of the request upon each party. (Cal. Code Regs, tit. 8, § 32132.)

Final Date

If no appeal is filed within the specified time limits, the dismissal will become final when the time limits have expired.

Sincerely,

M. SUZANNE MURPHY
General Counsel

By _____
Ellen Wu
Regional Attorney

Attachment

cc: David J. Dolloff, Staff Attorney

PUBLIC EMPLOYMENT RELATIONS BOARD

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Glendale, CA 91203-3219
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July 19, 2011

LaDonya Milner

Re: *LaDonya Milner v. California School Employees Association*
Unfair Practice Charge No. LA-CO-1469-E
WARNING LETTER

Dear Ms. Milner:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on March 25, 2011. LaDonya Milner (Milner or Charging Party) alleges that the California School Employees Association (CSEA or Respondent) violated section 3540 et seq. of the Educational Employment Relations Act (EERA or Act)[1] by failing to assist her with her lunch schedule changes and her discrimination complaints against her employer.

Facts as Alleged

Milner is employed as a secretary for the Lynwood Unified School District (District). Milner is a member of a bargaining unit exclusively represented by CSEA.

Charging Party did not provide a statement of the conduct alleged to constitute an unfair practice, but instead, attached several documents to the charge, which are summarized below.

The first document is a one-page document signed by an individual named "Katherine" which lists in bullet-point fashion her and parents' complaints against Milner regarding Milner's work performance and attitude.

The second document is a January 5, 2011 e-mail correspondence between Milner and District Director of Classified Personnel Kristin Olson (Olson) regarding Milner's personnel file. In Milner's e-mail message, she asks whether Olson has removed "the information that Mr. Gallarzo placed inside of my personnel file last year (October/November)"? Olson responds that the information has been removed.

The third document is an e-mail correspondence between Milner and Olson dated January 31, 2011 and February 1, 2011 regarding "Employee Concerns." In Milner's e-mail message, she

[1] EERA is codified at Government Code section 3540 et seq. The text of the EERA and PERB Regulations may be found at www.perb.ca.gov.

informs Olson that she recently sent her "a birage [sic] of information regarding harassment that I have been experiencing @ Lindbergh ES." Milner further states that she was instructed to inform Olson of the incidents and requests a written response from the District. Olson responds and confirms she received the information. Olson also asks Milner to clarify that she is filing "an (1) official complaint of harassment and an (2) official complaint of retaliation against your supervising principal, Mr. Flavio Gallarzo."

The fourth document is a printout of the EERA statute from PERB's website.

The last document is a memorandum dated February 14, 2011 from Milner to Olson regarding "Answer to the 2nd Almost Identical Written Summary on October 20, 2010." The memorandum appears to respond to each paragraph of a written summary, which was not included with the charge. The memorandum alleges conflicts with other employees and with Milner's supervisors, and references discipline imposed on Milner. The memorandum also makes brief references to CSEA in the following respects:

1. Milner alleges that the District changed her lunch schedule, to which she has addressed with CSEA and "to date there has been not [sic] clarity and no grievance has been filed."

2. Milner alleges that after the February 4, 2011 meeting, CSEA representative Donald Lockwood (Lockwood) informed her that she had been disciplined. Milner alleges that prior to the meeting, she had sent her "concerns" to both Olson and Lockwood, but "[e]veryone continues to ignore the elephant and continue [sic] to take part in what I deem a very dysfunctional and hostile working environment. . . . This is clear and blatant harassment, disparate treatment, racism to the highest degree."

Discussion

The charge appears to allege that CSEA failed to assist her regarding her lunch schedule changes and her racial harassment and discrimination claims against the District. For the following reasons, the charge fails to state a prima facie case.

Charging Party has alleged that the exclusive representative denied Charging Party the right to fair representation guaranteed by EERA section 3544.9 and thereby violated section 3543.6(b). The duty of fair representation imposed on the exclusive representative extends to grievance handling. (*Fremont Teachers Association (King)* (1980) PERB Decision No. 125; *United Teachers of Los Angeles (Collins)* (1982) PERB Decision No. 258.) In order to state a prima facie violation of this section of EERA, Charging Party must show that the Respondent's conduct was arbitrary, discriminatory or in bad faith. In *United Teachers of Los Angeles (Collins)*, the Public Employment Relations Board stated:

> Absent bad faith, discrimination, or arbitrary conduct, mere negligence or poor judgment in handling a grievance does not constitute a breach of the union's duty. [Citations omitted.]

> A union may exercise its discretion to determine how far to pursue a grievance in the employee's behalf as long as it does not arbitrarily ignore a meritorious grievance or process a grievance in a perfunctory fashion. A union is also not required to process an employee's grievance if the chances for success are minimal.

In order to state a prima facie case of arbitrary conduct violating the duty of fair representation, a Charging Party:

> must at a minimum include an assertion of sufficient facts from which it becomes apparent how or in what manner the exclusive representative's action or inaction was without a rational basis or devoid of honest judgment.

(*Reed District Teachers Association, CTA/NEA (Reyes)* (1983) PERB Decision No. 332, p. 9, quoting *Rocklin Teachers Professional Association (Romero)* (1980) PERB Decision No. 124; emphasis in original.)

With regard to when "mere negligence" might constitute arbitrary conduct, the Board observed in *Coalition of University Employees (Buxton)* (2003) PERB Decision No. 1517-H that, under federal precedent, a union's negligence breaches the duty of fair representation "in cases in which the individual interest at stake is strong and the union's failure to perform a ministerial act completely extinguishes the employee's right to pursue his claim." (Quoting *Dutrisac v. Caterpillar Tractor Co.* (9th Cir. 1983) 749 F.2d 1270, at p. 1274; see also, *Robesky v. Quantas Empire Airways Limited* (9th Cir. 1978) 573 F.2d 1082.)

Here, Milner vaguely alleges that she informed CSEA of the District's changes to her lunch schedule, but to date no grievance has been filed. PERB Regulation 32615(a)(5)[2] requires, inter alia, that an unfair practice charge include a "clear and concise statement of the facts and conduct alleged to constitute an unfair practice." The charging party's burden includes alleging the "who, what, when, where and how" of an unfair practice. (*State of California (Department of Food and Agriculture)* (1994) PERB Decision No. 1071-S, citing *United Teachers-Los Angeles (Ragsdale)* (1992) PERB Decision No. 944.) Mere legal conclusions are not sufficient to state a prima facie case. (*Ibid.*; *Charter Oak Unified School District* (1991) PERB Decision No. 873.) Here, there are no facts demonstrating when Milner complained to CSEA regarding her lunch schedule, who she talked to at CSEA, the substance of her complaints, and CSEA's response, if any. Accordingly, the charge fails to satisfy its burden. Moreover, the charge does not allege any facts demonstrating how CSEA's conduct was arbitrary, discriminatory, or in bad faith, and therefore fails to state a prima facie violation. (*United Teachers of Los Angeles (Collins)*, *supra*, PERB Decision No. 258.)

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[2] PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

Milner also alleges that CSEA has ignored her complaints of racial harassment and discrimination against the District. Again, the charge fails to provide sufficient facts regarding when Milner complained to CSEA regarding these incidents, who she talked to at CSEA, the substance of her complaints, and CSEA's response, if any. (PERB Regulation 32615(a)(5).) Moreover, even if there is evidence that CSEA failed to assist Milner with her discrimination claims, the charge still fails to state a prima facie case.

PERB has held that a union's duty of fair representation does not apply when a forum is not connected with some aspect of negotiations or administration of the collective bargaining agreement, and the exclusive representative does not control the means to the particular remedy. (*International Union of Operating Engineers, Local 51, AFL-CIO* (2000) PERB Decision No. 1382-S.) For instance, a union generally does not have a duty to pursue a union member's race-based civil rights claims. (*Greene v. Pomona Unified School District* (1995) 32 Cal.App.4th 1216, 1223-1224 [finding that because individuals with claims of discrimination against their employer based on race, gender, disability or any other characteristic protected by the anti-discrimination statutes have remedies available to them through the Department of Fair Employment and Housing and the Equal Employment Opportunity Commission, as well as civil actions under Title VII and Government Code section 12940, there is no need to require unions to become involved without a prior decision on the part of the union to do so].)

A union, however, may have a duty to act on these claims if the collective bargaining agreement contains a non-discrimination clause or if the agreement itself is discriminatory. (*Id.*, citing *Goodman v. Lukens Steel Co.* (1987) 482 U.S. 656, 667 [finding that the union had a duty to act where the collective bargaining agreement included an express clause binding both the employer and the union not to discriminate on racial grounds].)

Here, there are no facts demonstrating that the parties' collective bargaining agreement imposed a duty on CSEA to represent its members in discrimination claims against the District. Accordingly, absent such an agreement, CSEA has no duty to assist Milner with her racial discrimination claims against the District. (*Greene v. Pomona Unified School District*, *supra*, 32 Cal.App.4th 1216, 1223-1224.)

For these reasons the charge, as presently written, does not state a prima facie case.[3] If there are any factual inaccuracies in this letter or additional facts that would correct the deficiencies explained above, Charging Party may amend the charge. The amended charge should be prepared on a standard PERB unfair practice charge form, clearly labeled First Amended

[3] In *Eastside Union School District* (1984) PERB Decision No. 466, the Board explained that a prima facie case is established where the Board agent is able to make "a determination that the facts as alleged in the charge state a legal cause of action and that the charging party is capable of providing admissible evidence in support of the allegations. Consequently, where the investigation results in receipt of conflicting allegations of fact or contrary theories of law, fair proceedings, if not due process, demand that a complaint be issued and the matter be sent to formal hearing." (*Ibid.*)

Charge, contain all the facts and allegations you wish to make, and be signed under penalty of perjury by Charging Party or an authorized agent of Charging Party. The amended charge must have the case number written on the top right hand corner of the charge form. The amended charge must be served on the Respondent's representative and the original proof of service must be filed with PERB. If an amended charge or withdrawal is not filed on or before July 26, 2011,[4] PERB will dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Ellen Wu
Regional Attorney

EW

[4] A document is "filed" on the date the document is **actually received** by PERB, including if transmitted via facsimile. (PERB Regulation 32135.)